No. 92-111

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In The

Supreme Court of the United States

October Term, 1992

GARY T. DIXON, and LACY H. THORNBURG,

Petitioners,

v.

DOUGLAS WILLIAMS, JR.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WASHINGTON AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. May the bar of *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny – precluding the announcement or application of new rules on collateral review subject to two narrow exceptions – be lifted in a *third* circumstance: when the State does not assert the *Teague* doctrine prior to appeal?

II. Whether the new rule of *McKoy v. North Carolina*, 494 U.S. 433 (1990), satisfies the second exception to the *Teague* doctrine and may therefore be applied retroactively on collateral review?

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INTEREST OF *AMICI*

In *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, this Court recognized the limited role of federal habeas review by establishing a general rule barring the retroactive application of new rules on collateral review. This holding reflects the federalism and criminal justice interests in finality and comity and the validation of reasonable, good-faith state court determinations.

This case presents two important questions concerning the availability and application of the *Teague* doctrine. The *first* is whether the *Teague* doctrine may be waived when a State does not assert it prior to appeal. The *second* issue concerns the scope of the second exception to the *Teague* doctrine. *Amici* States have a substantial interest in protecting presumptively valid and final state court convictions and sentences from collateral attack on the basis of new rules which were unavailable at the conclusion of the direct review process.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

A North Carolina jury found Douglas Williams, Jr. guilty of murder in the first degree in the perpetration of first degree burglary, in the perpetration of a sex offense, and with malice and premeditation and deliberation. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, 341, *cert. denied*, 464 U.S. 865 (1983); *Williams v. Dixon*, 961 F.2d 448, 450 (4th Cir. 1992). The evidence showed that the victim, a 100-year old woman, was brutally tortured and battered. The jury recommended a sentence of death, which was imposed by the state trial court.

The direct review process was concluded in 1983, when this Court denied Williams' petition for writ of certiorari. *Williams v. North Carolina*, 464 U.S. 865 (1983). Following the denial of his request for state collateral relief, Williams filed a habeas petition in the U.S. District

Court, which was denied on September 13, 1988.[1] Williams appealed arguing, *inter alia*, that the district court erred in failing to hold the North Carolina jury instruction unconstitutional under *Mills v. Maryland*, 486 U.S. 367 (1988). *Mills* struck down a requirement that a jury must first *unanimously* find the existence of a mitigating factor before it could consider the specific mitigating evidence in issue.

On March 5, 1990, after the first oral argument in Williams' appeal, this Court decided *McKoy v. North Carolina*, 494 U.S. 433 (1990), which was predicated on *Mills* and held a North Carolina jury instruction unconstitutional for containing a unanimity requirement. Within one week of the *McKoy* decision, the State filed a letter of supplemental authorities asserting that the *Teague* doctrine precluded application of *McKoy*. The Fourth Circuit then ordered supplemental briefing on this issue.

In *Williams*, the U.S. Court of Appeals for the Fourth Circuit assumed that *McKoy/Mills* constituted a new rule within the meaning of the *Teague* doctrine and that the *McKoy/Mills* rule could still be retroactively applied because the second *Teague* exception was satisfied. *Williams*, 961 F.2d at 454-56. As an independent basis to vacate the sentence, the Fourth Circuit concluded that the State had waived the assertion of the *Teague* doctrine as an affirmative defense by failing to raise it prior to

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[1] Five months *after* the district court denied the habeas petition, *Teague v. Lane*, 489 U.S. 288 (1989), a non-capital case, was decided on February 22, 1989. The *Teague* doctrine was extended to capital cases on June 26, 1989, in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

appeal. *Id.* at 457-58. The Warden and Attorney General of North Carolina have petitioned for writ of certiorari. This Court has now ordered the respondent to file a brief in opposition to the petition for writ of certiorari.

REASONS THE WRIT SHOULD ISSUE

I. The Existing Lower Court Conflict On Whether The *Teague* Doctrine May Be Waived Raises Fundamental Questions Concerning The Role And Scope Of The *Teague* Doctrine Requiring Clarification By This Court

a. Introduction

The *Teague* doctrine advances the federalism and criminal justice interests in finality, predictability, and comity by emphasizing the limited role and function of federal habeas review in our criminal justice system. Under the *Teague* doctrine, on collateral review, a petitioner may not obtain the retroactive application or announcement of "new rules" (i.e., rules which are not dictated by prior precedent or which break new ground or impose a new obligation on the States) unless the rule falls within one of two narrow exceptions.[2]

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[2] *Teague*, 489 U.S. at 310, 311-13 (plurality opinion); *see also Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130, 1135, 117 L.Ed.2d 367, 376 (1992); *Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 2831, 111 L.Ed.2d 193, 211 (1990); *Butler v. McKellar*, 494 U.S. 407, 412 (1990); *Penry*, 492 U.S. at 313, 329.

Permitting a waiver of the *Teague* doctrine in effect establishes a *third* occasion (or exception) when the general rule of non-retroactivity of new rules will not apply. Consequently, a waiver exception allows all of the principles advanced by the *Teague* doctrine to be disrupted, including the federalism and criminal justice interests in finality and comity,[3] and the validation of reasonable, good-faith determinations of federal rights by state courts.[4]

The federal circuits are split on whether and how a State may waive the *Teague* doctrine.[5] Until this Court resolves this conflict, several consequences will occur. Disparate development and application of constitutional principles will be countenanced, as some circuits will allow federal habeas review to be used as a vehicle for the announcement and application of new rules, while

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[3] *See, e.g., Stringer*, 503 U.S. at ___, 112 S.Ct. at 1135, 117 L.Ed.2d at 377 ("The interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent."); *Penry*, 492 U.S. at 314 (noting finality concerns under retroactivity doctrine); *Teague*, 489 U.S. at 308 (plurality opinion) (discussing the federalism and criminal justice interests of comity and finality).

[4] *See Butler*, 494 U.S. at 414; *see also Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2827, 111 L.Ed.2d at 206; *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

[5] *See Williams*, 961 F.2d at 457-58 (noting split and citing numerous cases); *Clisby v. Jones*, 960 F.2d 925, 928 n.6 (11th Cir. 1992) (en banc) (same); *Boardman v. Estelle*, 957 F.2d 1523, 1534-35 (9th Cir.) (per curiam) (same), *cert. denied*, 61 U.S.L.W. 3264 (1992).

others will not. Where new rules are permitted on collateral review, the important finality and comity interests recognized by this Court will be undermined and reasonable, good-faith state court rulings will be disregarded. Until the waiver issue is resolved, the repercussions will extend beyond the particular case in which the new rule is sought. For example, the U.S. Court of Appeals for the Ninth Circuit has recently stated that where new rules are retroactively applied in one case, the court is *obligated* to apply the new rule in subsequent cases.[6] In resolving the present conflict among the circuits, this case presents an opportunity for full consideration of the jurisdictional and other questions raised by the waiver issue, which are briefly considered below.

b. This Case Presents An Opportunity To Clarify The Jurisdictional Nature Of The *Teague* Doctrine

The question on whether and how the *Teague* doctrine may be waived challenges the integrity of this important rule. The *Teague* doctrine is more than a principle simply respecting comity and finality interests. Other special

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[6] *See Jeffers v. Lewis*, No. 86-1840, 92 DAR 12484, n.4 (1992), *petition for cert. filed; Beam v. Paskett*, 966 F.2d 1563, 1570 n.5 (9th Cir. 1992), *petition for cert. filed*. The breadth of this avoidance of the *Teague* doctrine by these Ninth Circuit rulings cannot be overstated. New rules which are developed in proceedings arising in *other* States (or circuits for that matter) may be applied regardless of the State in which the habeas proceeding arises. This subjects every State to the risk of bearing the retroactive application of new rules arising in different States (or jurisdictions), even where the new rule is developed as a result of litigation tactics (e.g., waiver).

habeas corpus rules serve these interests as well.[7] More fundamentally, in light of those interests, the *Teague* doctrine implicates the *scope* and *purpose* of federal habeas review in our criminal justice system. For this reason, a strong argument can be made that the *Teague* doctrine is jurisdictional and therefore cannot be waived. As this Court has repeatedly stated, the heart of the *Teague* doctrine is premised upon the role and function of collateral review. *See Teague*, 489 U.S. at 306, 308, 312 (plurality opinion); *see also Saffle*, 494 U.S. at 488; *Butler*, 494 U.S. at 413. As Justice Harlan first noted, and this Court has reiterated on several occasions, "The relevant frame of reference [on the retroactivity question] is not the purpose of the new rule whose benefit the [petitioner] seeks, but instead the *purposes for which the writ of habeas corpus is made available.*"[8] Even the exceptions to the *Teague* doctrine have been established with a view toward the limited scope

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[7] *See, e.g., Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2554, 115 L.Ed.2d 640, 656 (1991) (applying independent and adequate state ground doctrine); *McCleskey v. Zant*, 499 U.S. ___, 111 S.Ct. 1454, 1468, 1469, 113 L.Ed.2d 517, 542, 543 (1991) (abuse of the writ doctrine); *Murray v. Carrier*, 477 U.S. 478, 490-92 (1986) (procedural default doctrine); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-54 (1986) (general bar against successive petitions); *Rose v. Lundy*, 455 U.S. 509, 516, 518 (1982) (exhaustion doctrine under 28 U.S.C. §§ 2254(b), (c)); *Sumner v. Mata*, 449 U.S. 539, 550 (1981) (presumption of correctness to state court findings of fact under 28 U.S.C. § 2254(d)).

[8] *Mackey v. United States*, 401 U.S. 667, 682 (1971) (emphasis added) (Harlan, J., concurring in part and dissenting in part) (quoted in *Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2830, 111 L.Ed.2d at 209; *Butler*, 494 U.S. at 413; *Teague*, 489 U.S. at 306 (plurality opinion)); *see also Saffle*, 494 U.S. at 486 (viewing the *Teague* doctrine as a "limitation on the proper exercise of habeas corpus jurisdiction").

of collateral review and the finality and comity concerns at stake. *See, e.g., Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2831, 111 L.Ed.2d at 211.

This jurisdiction theory finds direct support in the language of *Teague* and its progeny.[9] The *sua sponte* consideration of the *Teague* issue by this and other courts lends further support for the jurisdictional nature of this doctrine. *See* note 17, *infra*. Not surprisingly, this jurisdictional basis has led other lower federal courts to conclude that the *Teague* doctrine is non-waivable.[10] If this Court

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[9] *See, e.g., Stringer*, 112 S.Ct. at 1135, 117 L.Ed.2d at 376-77 ("When a petitioner seeks federal habeas relief based upon a principle announced after a final judgment, *Teague* and our subsequent decisions interpreting it *require* a federal court to answer an *initial question*, and in some cases a second. . . . ") (emphasis added); *Saffle*, 494 U.S. at 486 (noting "on collateral review, we must *first* determine whether the relief sought would create a new rule") (emphasis added); *Penry*, 492 U.S. at 313 ("[W]e must determine, as a *threshold* matter, whether granting [the petitioner] the relief he seeks would create a 'new rule'.") (emphasis added); *id.* at 329 (noting on collateral review, retroactivity issue is addressed "as a *threshold* matter") (emphasis added); *Teague*, 489 U.S. at 300 (plurality opinion) ("Retroactivity is properly treated as a *threshold* question. . . . ") (emphasis added); *accord Wright v. West*, 112 S.Ct. 2482, 2499, 120 L.Ed.2d 225, 250 (1992) (Kennedy, J., concurring) (noting "there is no requirement that we engage in the *threshold Teague* inquiry in a case in which it is clear that the prisoner would not be entitled to the relief he seeks even if his case were pending on direct review") (emphasis added).

[10] *See Hill v. McMackin*, 893 F.2d 810, 813 (6th Cir. 1989) (court "compelled" to raise retroactivity issue); *Hopkinson v. Shillinger*, 888 F.2d 1286, 1288 (10th Cir. 1989) (en banc) (noting the *Teague* doctrine presents a "threshold" inquiry implicating "the very scope of the writ of habeas corpus" and the "power [of

decides that *Teague* is jurisdictional, then it may conclude that – analogous to subject matter jurisdiction – the doctrine can never be waived and may in fact be asserted at any point during the proceeding.[11]

Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 2718, 111 L.Ed.2d 30, 38 (1990), does not establish that this Court has already rejected a jurisdictional basis for *Teague*. In *Collins*, this Court observed that, "Although the *Teague* rule is grounded in important considerations of federal state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, *must* raise and decide the issue *sua sponte*." *Id.* (emphasis in original).

The language in *Collins* does not resolve the jurisdictional status of *Teague* but in fact obfuscates it, furnishing several additional reasons for this Court to reconcile the existing split among the lower federal courts. *First*, the *Collins* decision has clouded the waiver issue, as federal courts have wrestled with its language and rationale.[12]

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the court] to grant relief"), *cert. denied*, 110 S.Ct. 3256 (1990); *see also Moore v. Zant*, 885 F.2d 1497, 1519 n.5 (11th Cir. 1989) (en banc) (Kravitch, J., dissenting) (noting threshold nature of inquiry), *cert. denied*, 110 S.Ct. 3255, *stay granted*, 111 S.Ct. 11 (1990).

[11] *See, e.g., Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978) (noting subject matter jurisdiction must respect, and is premised upon, statutory limits); *cf. United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988) (noting "[t]he distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics").

[12] *See, e.g., Boardman*, 957 F.2d at 1536 n.1; *Thomas v. State of Indiana*, 910 F.2d 1413, 1416 (7th Cir. 1990); *see also* M. Arkin, *The*

Second, pre-*Collins* and post-*Collins* decisions of this Court have expressly noted that the *Teague* doctrine posits a threshold inquiry, lending support for a jurisdictional basis for *Teague*. *See* note 9, *supra*.

Third, *Collins* appears distinguishable as a case where: (1) the State was explicitly asked by the Court at oral argument for the first time whether it would rely on *Teague*, and (2) the State expressly articulated its *choice* not to rely on the doctrine. *Collins*, 497 U.S. at ___, 110 S.Ct. at 2718, 111 L.Ed.2d at 38; *see also Smith*, 904 F.2d at 981 n.12. As this Court noted in *Collins*, where comity and sovereignty issues are at stake, it is not unusual for the State to waive expressly such issues so that others may be considered. *See* 497 U.S. at ___, 110 S.Ct. at 2718, 111 L.Ed.2d at 38 (citing *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 515 n.19 (1982) (Eleventh Amendment defense could be expressly waived by State to enable Court to resolve other issues)); *see also Wright*, 112 S.Ct. at

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Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane, 69 N.C.L. Rev. 371, 416 (1991) (noting *Collins* and other decisions have "left the lower courts in greater confusion than before and ha[ve] left litigants with little ability to predict the outcome of their own cases") (footnote omitted).

At least one court has construed *Collins* as enabling the court to reach the *Teague* question untimely raised by the State. *Smith v. Black*, 904 F.2d 950, 981 n.12 (5th Cir. 1990), *vacated and remanded on other grounds*, 112 S.Ct. 1463 (1992). Other courts, without reconciling the language in *Stringer*, 112 S.Ct. at 1135, 117 L.Ed.2d at 376-77, have overlooked the unique factual posture of *Collins* and have relied upon it for the broad proposition that *Teague* has no jurisdictional basis. *See Williams*, 961 F.2d at 457, 458; *see also Card v. Dugger*, 911 F.2d 1494, 1523 n. 30 (11th Cir. 1990); *Thomas*, 910 F.2d at 1416 (noting *Collins* "would seem to scotch earlier suggestions that the rule of *Teague* is jurisdictional").

2499, 120 L.Ed.2d at 250 (Kennedy, J., concurring) (noting the threshold inquiry of *Teague* is not necessary where it is clear the petitioner is not entitled to relief).

Fourth, the facts of this case are distinct from *Collins*. In the matter at bar, *Teague* was decided *after* the district court denied respondent's habeas corpus petition. *See* note 1, *supra*. The State therefore could not raise the *Teague* issue until the appeal. Even though *Teague* was decided after the district court's ruling, the assertion of *Teague* on appeal by the State is consistent with the principle, recognized by this Court, that "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).[13]

Finally, even if *Collins* can be reconciled with the language in *Stringer*, 112 S.Ct. at 1135, 117 L.Ed.2d at 376-77, *see* note 9, *supra*, *Collins* has not resolved all related issues on the waiver question, including those involving the facts of this case. For example, it is still an open issue: (1) whether silence may constitute a waiver; (2) whether in the face of a State's silence the court may still raise the *Teague* question *sua sponte*; (3) whether identified factors (e.g., finality and comity concerns) may be weighed in determining the appropriateness of waiver in a given case; or (4) whether a State may be deemed to have waived the issue when, as here, the *Teague* doctrine could not be asserted in the district court.

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[13] This principle has been applied by this Court in habeas corpus cases. *See Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982).

c. Assuming *Arguendo* That *Teague* Is Not Jurisdictional, It Does Not Necessarily Follow That The *Teague* Doctrine Is Subject To Waiver As An Affirmative Defense

Assuming *arguendo* that *Teague* is not jurisdictional, there are other bases which would avoid the conclusion that the doctrine is waivable or is an affirmative defense. For example, the *Teague* doctrine might also be considered within the context of the burden on the habeas petitioner. The burden is on the habeas petitioner to establish a federal right violation.[14] This burden allocation also makes sense in light of the civil nature of habeas proceedings. *See, e.g., Hilton v. Braunskill*, 481 U.S. 770, 776 & n.5 (1987); *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 269 (1978) (citations omitted). Further, the *Teague* doctrine only applies to new rules which would benefit the petitioner. *See, e.g., Wright*, 112 S.Ct. at 2500, 120 L.Ed.2d at 250 (Souter, J., concurring).

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[14] *See, e.g., Fox v. Kelso*, 911 F.2d 563, 569-70 (11th Cir. 1990); *Scruggs v. Williams*, 903 F.2d 1430, F.2d (11th Cir. 1990); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (petitioner holds burden to establish ineffective assistance of counsel claim); *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938) (on a collateral attack, "the burden of proof rests upon [a habeas petitioner] to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel"); *accord* 28 U.S.C. § 2254(d) (specifying level of burden on petitioner for factual determinations under more stringent "convincing evidence" standard); *Sumner*, 449 U.S. at 550 (discussing section 2254(d) standard); *cf. Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980) ("In a section 2255 motion, a petitioner has the burden of sustaining his contentions by a preponderance of the evidence."); *Kress v. United States*, 411 F.2d 16, 20 (8th Cir. 1969) (same).

Accordingly, this Court may conclude that it is appropriate for the petitioner to sustain the burden that the rule which he or she seeks to have announced or applied on collateral review is either not a new rule or satisfies one of the two exceptions to the *Teague* doctrine.

Independent of the burden on the habeas petitioner, it also makes sense for courts to deal with the applicability of the *Teague* doctrine at the outset of the proceeding. As a logical incident of the doctrine, this inquiry is justified as an initial matter concerning the use and availability of the writ of habeas corpus for relief. It may be for this reason that several courts have decided that *sua sponte* consideration of this issue is warranted. *See* note 17, *infra*.

Regardless of the resolution of these questions, it is difficult to conclude, as some lower courts have, that *Teague* may be deemed an affirmative defense in the traditional sense.[15] In the civil context, affirmative

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[15] Those cases deciding that the *Teague* doctrine may be waived as an affirmative defense have reached this determination in a conclusory manner without fully considering the role and purpose of this doctrine and the distinctions between the *Teague* doctrine and affirmative defenses. *See Boardman*, 957 F.2d at 1534 ("Some circuits (including this one) have allowed waiver, and others have not, but none has engaged in any significant analysis on the issue.") (parentheses in original); *see also Adamson v. Lewis*, 955 F.2d 614, 620 (9th Cir.) (en banc), *cert. denied*, 112 S.Ct. 3015 (1992); *Maynard v. Dixon*, 943 F.2d 407, 418 (4th Cir. 1991) ("assuming, without deciding, that the State waived its defense of non-retroactivity"), *cert. denied*, 112 S.Ct. 1211 (1992); *Coe v. Thurman*, 922 F.2d 528, 533 n.1 (9th Cir. 1990); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1104 n.4 (6th Cir. 1990) (en banc) (concluding without discussion or citing any authority

defenses typically include duress, contributory negligence, statute of limitations, laches and release. *See* Fed. R. Civ. P. 8(c). In criminal proceedings, affirmative defenses usually include insanity, intoxication, self-defense and coercion. In contrast to these long-established affirmative defenses, which largely entail an allegation and proof of specific facts, the *Teague* doctrine posits a legal question, which not only implicates the scope of the writ of habeas corpus but also serves to validate the good-faith, reasonable legal determinations of state courts. Moreover, it is hard to classify the *Teague* doctrine as an affirmative defense when some courts, including this one, have allowed the issue to be considered *sua sponte*. *See* note 17, *infra*. Because the *Teague* doctrine does not contain any of the traditional attributes of an affirmative defense, it arguably should not be employed as an affirmative defense.

d. Assuming *Arguendo* That *Teague* May Be Waived, This Case Presents An Opportunity For This Court To Provide Guidance To The Lower Federal Courts On The Standards To Govern Waiver Cases

Even if this Court concludes that the *Teague* doctrine may be waived, the question becomes what standard should be employed to determine whether *Teague* should

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that the *Teague* doctrine may be waived), *cert. denied*, 111 S.Ct. 1608 (1991); *see also Moore*, 885 F.2d at 1524-25 (en banc) (Johnson, J., dissenting) (suggesting that the *Teague* doctrine may be waived but assuming *arguendo* issue was not waived).

be waived in a particular case. The possibility of waiver effectively creates a new exception to the *Teague* doctrine, permitting new rules to be established on collateral review. The Court can clarify when this third exception should operate.[16] For example, even the Ninth Circuit "discretionary waiver" approach acknowledges that comity and finality concerns are relevant factors to be assessed in determining whether *Teague* is waived in a particular case. *See Boardman*, 957 F.2d at 1537. Further, several courts, including this one, have raised the applicability of the *Teague* doctrine *sua sponte*.[17] A related question is whether, and under what circumstances, a court could *sua sponte* apply the *Teague* doctrine.

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[16] Other analogous waiver rules also contain exceptions. For example, the general appellate waiver rule (that issues not preserved at trial may not be considered on appeal) is not automatically applied in every case. *See, e.g., Boardman*, 957 F.2d at 1535; *Thomas*, 910 F.2d at 1415.

[17] *See, e.g., Saffle*, 494 U.S. at 496 n.1 (Brennan, J., dissenting) (noting *sua sponte* consideration of retroactivity issue); *Zant v. Moore*, 489 U.S. 836 (1989) (per curiam) (remanding after oral argument in light of *Teague*); *Wiley v. Puckett*, 969 F.2d 86, 96 n.13 (5th Cir. 1992) (considering retroactivity issue *sua sponte*); *Smith*, 904 F.2d at 981 & n.12 (court *sua sponte* requested supplemental briefing on *Teague* issue); *Hill*, 893 F.2d at 813 (noting issue may be raised *sua sponte*, but concluding no "new rule" was implicated); *Hopkinson*, 888 F.2d at 1288 (en banc) (court *sua sponte* raised *Teague* issue); *see also Hanrahan v. Greer*, 896 F.2d 241, 245 (7th Cir. 1990) (concluding state may waive issue but acknowledging that "a court may consider retroactivity questions that the parties did not present"), *later appeal*, 933 F.2d 1328 (7th Cir.), *cert. denied*, 112 S.Ct. 446 (1991).

II. The Conflict Whether The New Rule Of *McKoy v. North Carolina* May Satisfy The Second *Teague* Exception Provides An Opportunity For This Court To Furnish Guidance To The Lower Federal Courts On The Scope Of The Second *Teague* Exception

This Court has yet to decide a case where the second *Teague* exception applies, allowing the application and announcement of new rules on collateral review which involve " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495 (quoting *Teague*, 489 U.S. at 311 (plurality opinion)); *see also Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2831, 111 L.Ed.2d at 211 (noting two parts to second exception). To date, the primary example of a rule satisfying this exception is the right to representation by counsel in all criminal trials for serious offenses. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *see also Saffle*, 494 U.S. at 495; *Teague*, 489 U.S. at 311-12 (plurality opinion).

This Court has acknowledged that "[t]he precise contours of this exception may be difficult to discern." *Saffle*, 494 U.S. at 495. Further, *Teague* noted the narrowness of the second exception, observing it is "unlikely that many [] components of basic due process [central to an accurate determination of innocence or guilt] have yet to emerge." *Teague*, 489 U.S. at 313 (plurality opinion); *see also Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2831, 111 L.Ed.2d at 211 (referring to the narrowness of both exceptions); *Saffle*, 494 U.S. at 488 (same).

Unlike the appellate court below, other courts which have considered the *McKoy/Mills* holding have concluded

that it constitutes a new rule within the meaning of the *Teague* doctrine which may not be retroactively applied on collateral review.[18] Until clarity is provided on the scope of this exception, lower federal courts will continue to wrestle with the application of the second exception, allowing for the development of new rules on collateral review. Therefore, this case also presents an opportunity for the Court to provide guidance to lower federal courts on this important habeas issue.

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[18] *See Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir. 1992), *petition for cert. filed; see also Zettlemoyer v. Fulcomer*, 923 F.2d 284, 317 n.3 (3rd Cir.) (Sloviter, J., dissenting), *cert. denied*, 112 S.Ct. 280 (1991); *McDougall v. Dixon*, 921 F.2d 518, 539 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2840, *stay denied, cert. denied*, 112 S.Ct. 334 (1991).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant the petition for writ of certiorari.

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